

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Plaintiff Dana W. Shinn appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied his applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be REVERSED and REMANDED for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

21 Plaintiff is a 32 year old man with a high school education and 3½ years of community
22 college. Administrative Record (“AR”) at 918. His past work experience includes

01 employment as a delivery person, house painter, housekeeper/maintenance assistant in a hotel,
02 and dietary aide in a nursing home. AR at 921, 926, 928, 945-47. Plaintiff was last gainfully
03 employed on October 24, 1999. AR at 23.

04 On October 15, 2002, plaintiff filed applications for DIB and SSI payments. AR at
05 20, 76-78, 657-59. Plaintiff asserts that he is disabled due to an Affective Disorder. Dkt. No.
06 14 at 2.

07 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 20.
08 Plaintiff requested a hearing which took place on April 18, 2005. AR at 51, 876-911. On July
09 27, 2005, the ALJ issued a decision finding plaintiff not disabled and denied benefits based on
10 his finding that plaintiff could return to his past job as a laundry worker. AR at 20. On
11 September 26, 2006, the Appeals Council reversed and remanded for additional administrative
12 proceedings to evaluate new medical and examining source evidence, and to determine whether
13 plaintiff has any past relevant work. AR at 20, 682-85.

14 The ALJ held another hearing on January 3, 2007. AR 912-69. On May 14, 2007, the
15 ALJ issued a decision finding plaintiff not disabled within the meaning of the Act from October
16 24, 1999, through the date of the decision. AR 20-31. On October 29, 2008, the Appeals
17 Council denied plaintiff's request for review, making the ALJ's ruling the "final decision" of
18 the Commissioner as that term is defined by 42 U.S.C. § 405(g). On December 12, 2008,
19 plaintiff timely filed the present action challenging the Commissioner's decision. Dkt. No. 3.

20 **II. JURISDICTION**

21 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
22 405(g) and 1383(c)(3).

III. STANDARD OF REVIEW

02 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
03 social security benefits when the ALJ's findings are based on legal error or not supported by
04 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
05 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
06 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
07 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th
08 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical
09 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d
10 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it
11 may neither reweigh the evidence nor substitute its judgment for that of the Commissioner.
12 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to
13 more than one rational interpretation, it is the Commissioner's conclusion that must be upheld.

15 The Court may direct an award of benefits where “the record has been fully developed
16 and further administrative proceedings would serve no useful purpose.” *McCartey v.*
17 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
18 (9th Cir. 1996)). The Court may find that this occurs when:

19 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
20 claimant's evidence; (2) there are no outstanding issues that must be resolved
21 before a determination of disability can be made; and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled if he
considered the claimant's evidence.

²² *Id.* at 1076-77; see also *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that

01 erroneously rejected evidence may be credited when all three elements are met).

IV. DISCUSSION

03 The Commissioner follows a five-step sequential evaluation process for determining
04 whether a claimant is disabled. *See* 20 C.F.R. § 404.1520, 416.920 (2000). At step one, it
05 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff has
06 not engaged in substantial gainful activity since the alleged onset date. AR 23. At step two, it
07 must be determined whether a claimant suffers from a severe impairment. The ALJ found
08 plaintiff has the following severe impairments: affective disorder and substance abuse disorder.
09 AR 23. Step three asks whether a claimant's impairments meet or equal a listed impairment.
10 The ALJ found that plaintiff did not have an impairment or combination of impairments that
11 meet or equal a listed impairment. AR 24. If a claimant's impairments do not meet or equal a
12 listing, the Commissioner must assess residual functional capacity ("RFC") and determine at
13 step four whether the claimant has demonstrated an inability to perform past relevant work.
14 The ALJ found that plaintiff has the RFC to perform all levels of physical activity and can
15 adequately perform the mental activities generally required by competitive, remunerative,
16 unskilled work. AR 24. "He can understand, remember, and carry out simple instructions;
17 make judgments commensurate with the functions of unskilled work, i.e., simple work-related
18 decisions; respond appropriately to supervisors, coworkers, and usual work situations; and can
19 deal with changes in a routine work setting." AR 24. The ALJ found that plaintiff has no past
20 relevant work. AR 29. If the claimant is able to perform his past relevant work, he is not
21 disabled; if the opposite is true, then the burden shifts to the Commissioner at step five to show
22 that the claimant can perform other work that exists in significant numbers in the national

01 economy, taking into consideration the claimant's RFC, age, education, and work experience.
02 20 C.F.R. §§ 404.1520(g), 416.920(g); *Tackett*, 180 F.3d 1094, 1099-1100 (9th Cir. 1999).
03 The ALJ found that plaintiff is capable of making a successful adjustment to other work that
04 exists in significant numbers in the national economy, such as fast food worker, flagger, and
05 housecleaner. AR 30. Accordingly, the ALJ concluded that plaintiff is not disabled. AR
06 30-31.

07 This Court's review of the ALJ's decision is limited to whether the decision is in
08 accordance with the law and the findings supported by substantial evidence in the record as a
09 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
10 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
11 reasonable mind might accept as adequate to support a conclusion. *Magallanes*, 881 F.2d at
12 750. If there is more than one rational interpretation, one of which supports the ALJ's
13 decision, the Court must uphold that decision. *Thomas*, 278 F.3d at 954.

14 Plaintiff argues that the ALJ erred in (1) evaluating lay witnesses statements; (2)
15 evaluating the medical evidence; (3) evaluating plaintiff's RFC; and (4) finding at step five that
16 plaintiff is capable of adjusting to other work that exists in significant numbers in the national
17 economy. Dkt. 20. He requests remand for an award of benefits or, alternatively, for further
18 administrative proceedings. The Commissioner argues that the ALJ's decision is supported by
19 substantial evidence and should be affirmed. For the reasons described below, the Court
20 agrees with the plaintiff.

21 A. Lay Witness Statements

22 “In determining whether a claimant is disabled, an ALJ must consider lay witness

01 testimony concerning a claimant's ability to work.” *Stout v. Comm'r*, 454 F.3d 1050, 1053
02 (9th Cir. 2006). Lay witness testimony as to a claimant's symptoms or how an impairment
03 affects ability to work is competent evidence, 20 C.F.R. § 404.1513(e), *Sprague v. Bowen*, 812
04 F.2d 1226, 1232 (9th Cir.1987), and therefore cannot be disregarded without comment.
05 *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993). If an ALJ wishes to discount the
06 testimony of a lay witness, he must provide reasons germane to each witness and may not
07 simply categorically discredit the testimony. *Id.* at 919.

08 Plaintiff contends that the ALJ failed to properly consider written statements submitted
09 by his mother, father, and girlfriend, regarding the nature and extent of his impairments. Dkt.
10 No. 14 at 13-14. For example, plaintiff's mother indicates that plaintiff's symptoms come and
11 go, and that plaintiff is sometimes sick twice a month for two to four days. AR 138. In
12 addition, plaintiff's mother states that his “medication does help the severity of his attacks, but
13 does not make them go away.” *Id.* Plaintiff's father and girlfriend also indicate that the
14 unpredictability of his impairments greatly impact his functional abilities. AR 146-50, 175.
15 Plaintiff claims that “[t]he witnesses' observations are largely consistent with the medical
16 evidence and plaintiff's testimony and effectively rejecting such evidence is clearly not
17 ‘harmless error’ when they negate the ability to perform consistent full-time work.” Dkt. No.
18 14 at 14.

19 The ALJ stated, “The lay witness statements of record basically indicate that the
20 claimant's functional abilities fluctuate with his mood.” AR at 26. The ALJ assigned these
21 statements “some weight, but only to the extent that they support the findings established in this
22 decision.” *Id.* The ALJ's decision provides no basis to determine what was accepted and

01 what was rejected. The statement in his decision, thus, provides no effective basis for judicial
02 review.

03 The Commissioner argues that “[t]he ALJ’s findings were predicated on the record,
04 which he found established that Plaintiff was not entirely credible; therefore, testimony of
05 Plaintiff’s family and friends was fraught with the same credibility problem.” (Dkt. 17 at 9).
06 The Commissioner further argues that “because Plaintiff did not comply with prescribed
07 treatment of psychotherapy and medication, the fluctuation in his abilities to function was in
08 question.” *Id.* Although inconsistencies with the evidence of record may be a reason to reject
09 lay testimony, the ALJ did not identify any specific inconsistencies between the witness
10 statements and the record. Moreover, an ALJ cannot reject lay testimony simply by rejecting
11 the credibility of the claimant. *See Dodrill*, 12 F.3d at 918-19 (holding that lay witnesses are
12 competent to make independent observations of a claimant’s symptoms and daily activities, and
13 to testify as to her condition). The Commissioner’s post hoc explanation is insufficient to cure
14 the ALJ’s error. *See, e.g., Ceguerra v. Sec’y of Health & Human Serv.*, 933 F.2d 735, 738 (9th
15 Cir. 1991)(“A reviewing court can evaluate an agency’s decision only on the grounds
16 articulated by the agency.”). If the ALJ wishes to discount the testimony of lay witnesses, the
17 ALJ, not the Commissioner, must provide specific reasons that are germane to each witness.
18 *Dodrill*, 12 F.3d at 919.

19 If an ALJ fails to adequately address lay testimony favorable to the claimant, “a
20 reviewing court cannot consider the error harmless unless it can confidently conclude that no
21 reasonable ALJ, when fully crediting the testimony, could have reached a different disability
22 determination.” *Stout*, 454 F.3d at 1056. Here, the Court cannot so conclude. Crediting the

01 lay witness testimony in this case negates plaintiff's ability to perform full-time employment.
02 The vocational expert specifically opined that missing work more frequently than once or twice
03 a month due to frequent flare-up of symptoms would preclude full-time work. AR 959.
04 Accordingly, the ALJ's error is not harmless. *See Stout*, 454 F.3d at 1056. On remand, the
05 ALJ will review the lay witness testimony in light of the record and specifically identify those
06 parts he accepts and those parts that he rejects.

07 B. Medical Opinion

08 As a matter of law, more weight is given to a treating physician's opinion than to that of
09 a non-treating physician because a treating physician "is employed to cure and has a greater
10 opportunity to know and observe the patient as an individual." *Magallanes*, 881 F.2d at 751;
11 20 C.F.R. § 404.1527(d)(1)-(2). "Likewise, greater weight is accorded to the opinion of an
12 examining physician than a non examining physician." *Andrews*, 53 F.3d at 1041. However,
13 under certain circumstances, a treating or examining physician's opinion can be rejected,
14 whether or not that opinion is contradicted by other medical evidence of record. *Magallanes*,
15 881 F.2d at 751. An ALJ must give clear and convincing reasons for rejecting a treating or
16 examining physician's opinion if that opinion is not contradicted by other evidence, and
17 specific and legitimate reasons if it is. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998).
18 "This can be done by setting out a detailed and thorough summary of the facts and conflicting
19 clinical evidence, stating his interpretation thereof, and making findings." *Id.* (citing
20 *Magallanes*, 881 F.2d at 751). The ALJ must do more than merely state his conclusions. "He
21 must set forth his own interpretations and explain why they, rather than the doctors', are
22 correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)). Such

01 conclusions must at all times be supported by substantial evidence. *Id.*

02 1. *Dr. Schimmel*

03 Plaintiff asserts that the ALJ improperly rejected the opinion of examining psychologist
04 Don Schimmel, Ph.D., AR 249-57, 819-25, 859-64, regarding plaintiff's functional limitations
05 without a "specific and legitimate" basis. Dkt. 14 at 15-16. In 2006, Dr. Schimmel
06 completed a Department of Social and Health Services' ("DSHS") Psychological/Psychiatric
07 Evaluation, which rated plaintiff with moderate to severe functional limitations. AR 819-24.
08 Specifically, Dr. Schimmel opined that plaintiff had "moderate" limitations in his ability to
09 perform routine tasks and to care for himself, including personal hygiene and appearance;
10 "marked" limitations in his ability to learn new tasks; and "severe" limitations in his ability to
11 understand, remember and follow complex instructions, to exercise judgment and make
12 decisions, to relate appropriately to co-workers and supervisors, and to respond appropriately to
13 and tolerate the pressure and expectations of a normal work setting. AR 821.

14 The ALJ rejected Dr. Schimmel's opinion, stating:

15 The doctor reported that the claimant's bipolar disorder was in partial remission
16 with a number of his symptoms being controlled on medication. However, the
17 claimant historically went off his medications when manic. I note that the
18 functional limitations are based on the claimant's self-report at the time of the
19 interview [AR 821]. However, the doctor's recommendation that the claimant
participate in vocational rehabilitation [AR 822] is not consistent with the level
of limitations he reported on the DSHS assessment form. Therefore, I have
given his opinion no significant probative weight and accorded greater weight to
other examining psychologists of record.

20 AR 28.

21 The ALJ provided specific and legitimate reasons for rejecting Dr. Schimmel's opinion.
22 First, the ALJ noted that plaintiff's bipolar disorder was in partial remission and that a number

01 of his symptoms were being controlled on medication, although he historically goes off his
02 medication. AR 28. Second, the ALJ found that the functional limitations set forth in Dr.
03 Schimmel's evaluation were based on plaintiff's self-reported symptoms. "A physician's
04 opinion of disability 'premised to a large extent upon the claimant's own accounts of his
05 symptoms and limitations' may be disregarded where those complaints have been 'properly
06 discounted.'" *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir.
07 1999)(quoting *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989)). Here, the ALJ properly
08 found plaintiff not entirely credible and plaintiff made no objection to the ALJ's decision. AR
09 26-29. Third, the ALJ found that Dr. Schimmel's opinion regarding the level of plaintiff's
10 functional limitations provided on the DSHS evaluation form was inconsistent with his
11 recommendation that plaintiff participate in vocational rehabilitation. AR 28.

12 Plaintiff relies on *Cox v. Califano*, 587 F.2d 988, 991 (9th Cir. 1978), to argue that "a
13 willingness to engage in rehabilitative activity and release by one's doctor to engage in such an
14 attempt is clearly not probative of a present ability to in fact engage in this activity." Dkt. 14 at
15 15, Dkt. 18 at 4. In *Cox*, the ALJ improperly relied on a treating doctor's referral to vocational
16 rehabilitation as proof of the claimant's present ability to work. *Cox*, 587 F.2d at 991. Unlike
17 *Cox*, however, the ALJ here did not base his disability finding on Dr. Schimmel's
18 recommendation that plaintiff engage in vocation rehabilitation. Rather, the ALJ merely
19 found that Dr. Schimmel's recommendation that plaintiff engage in vocational rehabilitation
20 was inconsistent with the level of limitations he reported on the DSHS assessment form. The
21 ALJ thus gave Dr. Schimmel's opinion no significant probative weight but accorded greater
22 weight to other examining psychologists of record. AR 28. The Court agrees with the

01 Commissioner that there was no legal error.

02 2. *Dr. Morris*

03 The plaintiff also argues that the ALJ failed to provide specific and legitimate reasons
04 for rejecting the opinion of examining psychologist Kevin Morris, Psy.D., AR 245-48, 386-91,
05 865-75. Dkt. 14 at 15. In February 2000 and March 2003, Dr. Morris completed DSHS
06 Psychological/Psychiatric Evaluations, which rated plaintiff with moderate to severe functional
07 limitations. AR 245-48, 386-91, 866-75. Plaintiff contends that the ALJ ignored Dr.
08 Morris's opinions without analysis, stating only, "Other opinion evidence of record has also
09 been considered as set out in the prior decision." AR 28, 678. The ALJ noted in his prior
10 decision that Dr. Morris opined in March 2003 that "mental health treatment would likely
11 improve or restore the claimant's ability to work for pay, given the efficacy of treatment thus
12 far." AR 678. The ALJ also noted that Dr. Morris questioned plaintiff's medication
13 compliance and felt that plaintiff's continued marijuana abuse could be exacerbating his
14 psychiatric symptoms. *Id.*

15 The Commissioner concedes that the ALJ failed to articulate the weight given to Dr.
16 Morris's medical opinions, but argues that such error was harmless because the ALJ's decision
17 remains legally valid despite the error. Dkt. 17 at 11-12. The Commissioner contends that
18 "the functional limitations set forth by Dr. Morris were based on Plaintiff's condition due to
19 noncompliance with the prescribed medication and cannabis use." Dkt. 17 at 12. The Court
20 disagrees with the Commissioner that the ALJ's error was harmless.

21 The ALJ's prior decision was vacated, and upon remand the ALJ was specifically
22 ordered to evaluate examining source opinions pursuant to 20 C.F.R. § 404.1527, and to explain

01 the weight given to such opinion evidence, including Dr. Morris's opinion. AR 684.
02 Contrary to the Commissioner's contention, Dr. Morris's 2003 evaluation indicates that there is
03 "(?) possibly" drug abuse, but that plaintiff's conditions are not caused by past or present drug
04 abuse. AR 387. In addition, when asked whether "mental health intervention [is] likely to
05 restore or substantially improve the individual's ability to work for pay in a regular and
06 predictable manner," Dr. Morris wrote, "[q]uite possibly, given efficacy of tx." AR 389.
07 This does not support the Commissioner's conclusion that plaintiff "could recover the ability to
08 work if he complied with his regimen." Dkt. 17 at 12.

09 It was erroneous for the ALJ to simply ignore the doctor's opinion without mention.
10 On remand, the ALJ should properly evaluate Dr. Morris's opinions.

11 2. *Ms. Smith*

12 Plaintiff maintains that the ALJ erred in rejecting functional limitations identified by
13 mental health counselor Christine Smith, M.A., AR 444-49. Dkt. 14 at 15. Plaintiff contends
14 that the moderate limitations identified by Ms. Smith support the limitations identified by Drs.
15 Schimmel and Morris, and should have been considered. *Id.*

16 On March 23, 2005, Ms. Smith filled out a mental impairment assessment form
17 indicating that plaintiff had moderate limitations¹ in the areas of sustaining an ordinary routine
18 without special supervision, performing activities within a schedule, interacting with the public,
19 and asking simple questions. AR 444-449. Ms. Smith left blank 12 of the 26 boxes,
20 explaining in the "Comment" section that "[i]n my capacity as a mental health counselor, I have

21 1 "Moderately limited" is defined as "[a]n impairment which seriously interferes with, and in
22 combination with one or more other restrictions assessed, may preclude the individual's ability to perform the
designated activity on a regular and sustained basis, i.e., 8 hours a day, for 5 days a week, or an equivalent work
scheduled." AR 444.

01 not had occasion to observe anything that would provide me with the necessary data to respond
02 to work related questions.” AR 447.

03 The ALJ rejected Ms. Smith’s opinion, stating:

04 In May 2005, Christine Smith, M.A., filled out a mental impairment assessment
05 form and indicated that due to bipolar, not otherwise specified, the claimant
06 would have some moderate limitations in certain factors pertaining to sustained
07 concentration and persistence, social interaction, and adaptation. Under the
08 comments section of this form Ms. Smith stated, “In my capacity as a mental
09 health counselor, I have not had the occasion to observe anything that would
10 provide me with the necessary data to respond to work related questions.” . . . In
11 light of Ms. Smith’s comment, it appears that she relied on the claimant’s
12 self-reports when she completed this form. Nevertheless, the level of
13 limitations she noted does not substantiate limitations beyond the findings
14 established in this decision. Furthermore, Ms. Smith is not a licensed
15 psychiatrist or a licensed psychologist and thus is not considered an acceptable
16 medical source within the meaning of the regulations . . . Ms. Smith’s opinions
17 are considered as lay witness statements and have been accorded the appropriate
18 weight pursuant to SSR 06-03p. Greater probative weight was accorded the
19 opinions of the examining psychiatrists in regard to the claimant’s functional
20 capacity, as noted in the previous paragraphs.

21 AR 28.

22 In order to determine whether a claimant is disabled, an ALJ may consider lay-witness
23 sources, such as testimony by nurse-practitioners, physicians’ assistants, and counselors. 20
24 C.F.R. § 404.1513(d). Such testimony regarding a claimant’s symptoms or how an
25 impairment affects his ability to work is competent evidence and cannot be disregarded without
26 comment. *Dodrill*, 12 F.3d at 918-19. This is particularly true for “non-medical” sources
27 such as nurses and counselors. See SSR 06-03p (noting that because such persons “have
28 increasingly assumed a greater percentage of the treatment and evaluation functions previously
29 handled primarily by physicians and psychologists,” their opinions “should be evaluated on key
30 issues such as impairment severity and functional effects, along with the other relevant

01 evidence in the file.”). If an ALJ chooses to discount testimony of a lay witness, he must
02 provide “reasons that are germane to each witness,” and may not simply categorically discredit
03 the testimony. *Id.* at 919.

04 Here, the ALJ properly considered the opinion of mental health counselor Ms. Smith.
05 First, the ALJ noted that Ms. Smith relied on plaintiff’s self-reports, and the ALJ properly
06 found that plaintiff was not entirely credible. AR 23. *See* Morgan, 169 F.3d at 602 (holding
07 that a physician’s opinion on disability premised on a claimant’s own accounts of his symptoms
08 and limitations may be disregarded where those complaints have been properly discounted).
09 Second, the ALJ noted that the level of limitations identified by Ms. Smith did not substantiate
10 limitations beyond the ALJ’s findings. *Id.* Third, the ALJ stated that Ms. Smith was a lay
11 witness and not an acceptable medical source, and was therefore accorded less weight pursuant
12 to SSR 06-03p. *Id.* And fourth, the ALJ properly accorded greater weight to the opinions of
13 examining psychiatrists Linda Ford, M.D., and Linda Williams, M.D. *Id.* The ALJ noted that
14 Dr. Ford found that plaintiff “could perform simple and repetitive tasks as well as more detailed
15 and complex tasks. He interacted well during the examination and there was no history of
16 problems in this area.” AR 28. The ALJ also noted that Dr. Williams found that plaintiff’s
17 “social functioning appeared to be good according to his performance during the interview and
18 based on the level of his daily activities. The [plaintiff’s] concentration and pace were within
19 normal limits as well.” *Id.* An ALJ may properly accord less weight to opinions from “other
20 sources” than to opinions from acceptable medical sources. *See Gomez v. Chater*, 74 F.3d
21 967, 970 (9th Cir. 1996). The ALJ’s decision to discount Ms. Smith’s opinion was proper.

22 / / /

01 C. Residual Functional Capacity

02 “RFC is an assessment of an individual's ability to do sustained work-related physical
03 and mental activities in a work setting on a regular and continuing basis. A ‘regular and
04 continuing basis’ means 8 hours a day, for 5 days a week, or an equivalent work schedule.”
05 SSR 96-8p at 1. The RFC assessment must be based on all of the relevant evidence in the case
06 record, such as: medical history; the effects of treatment, including limitations or restrictions
07 imposed by the mechanics of treatment (e.g., side effects of medication); reports of daily
08 activities; lay activities; recorded observations; medical source statements; effects of
09 symptoms, including pain, that are reasonably attributed to a medically determinable
10 impairment; evidence from work attempts; need for structured living environment; and work
11 evaluations. SSR 96.8p.

12 Here, the ALJ found that plaintiff has the RFC to perform all levels of physical activity
13 and can adequately perform the mental activities generally required by competitive,
14 remunerative, unskilled work. AR 24. The ALJ determined that “[h]e can understand,
15 remember, and carry out simple instructions; make judgments commensurate with the functions
16 of unskilled work, i.e., simple work-related decisions; respond appropriately to supervisors,
17 coworkers, and usual work situations; and can deal with changes in a routine work setting.”
18 AR 24.

19 Because this case is being remanded for the reasons indicated above, the Court eschews
20 a detailed analysis of the ALJ's RFC assessment. In light of the fact that the Court has found
21 that the ALJ failed to properly evaluate the lay testimony of plaintiff's mother, father, and
22 girlfriend, and the opinions of Dr. Morris, the ALJ's RFC determination – which failed to

01 account for lay testimony and Dr. Morris's opinion regarding how plaintiff's impairments
02 affect his ability to work – is also reversed and the issue remanded. *See Stout*, 454 F.3d at 1056
03 (finding that the ALJ's failure to properly evaluate lay witness testimony was not harmless
04 because the RFC determination and the VE's response to a hypothetical failed to include lay
05 testimony about the plaintiff's limitations). After reevaluating the lay testimony and Dr.
06 Morris's opinion, the ALJ will be in a better position to evaluate the plaintiff's RFC.
07 Plaintiff also disputes the ALJ's finding that his two unsuccessful work attempts support the
08 conclusion that plaintiff can perform sustained full-time work on a continuing basis. Dkt. 14 at
09 16-17 (citing AR 23). Although the ALJ found that plaintiff's post onset work activity did not
10 constitute "substantial gainful activity," he did find that such activity "confirms the claimant's
11 ability to work." AR 23. The ALJ noted:

12 Although he only performed the job of delivery driver part-time, 20-25 hours
13 per week, he managed to perform the job tasks for two to three months. He
14 drove a truck and delivered tea to espresso stands and restaurants. The
15 claimant testified that this involved handling 30 to 40 pounds of bottled tea with
16 the use of a hand truck. He also worked at house painting for a few days.
17 While none of the claimant's post onset work rises to the level of substantial
18 gainful activity, it does indicate that the claimant would be capable of the
19 unskilled work level, as set out in the residual functional capacity above.

20 AR 27. The ALJ incorrectly states that "the delivery job ended because he got into an accident
21 trying to park the truck and not due to his alleged impairments." AR 27. Contrary to the
22 ALJ's assertion, plaintiff testified that the accident occurred because he was "having a
23 depressive episode" and that his spatial and mental judgments were affected. AR 948.
24 Plaintiff also testified that he had a job as a housepainter for four days, but that his employer
25 was dissatisfied with the pace and quality of his work. AR 927-28.

01 The Court agrees with plaintiff that the ALJ improperly concluded that plaintiff's post
02 onset work activity confirms his ability to perform sustained full-time work on a continuing
03 basis. As the Ninth Circuit explained in *Gatliff v. Comm'r of Soc. Sec. Admin.*, 172 F.3d 690,
04 693 (9th Cir. 1999), “[a] finding that a claimant is able to engage in substantial gainful activity
05 requires more than a simple determination that the claimant can find employment and that he
06 can physically perform certain jobs; it also requires a determination that the claimant can hold
07 whatever job he finds for a significant period of time.” “Indeed, the SSA considers jobs that
08 end within three months because of the claimant’s impairments to be ‘unsuccessful work
09 attempts,’ and does not consider such short term jobs as evidence of an ability to engage in
10 substantial gainful activity.” *Id.* at 694 (citing SSR 84-25). On remand, the ALJ should also
11 reevaluate plaintiff’s post onset work activity when assessing his RFC.²

12

13 2 Plaintiff also argues that his part-time school attendance does not support the ALJ’s conclusion that he
14 has the RFC to perform sustained full-time work on a continuing basis. Dkt. 14 at 16-17. In assessing RFC, the
15 ALJ found plaintiff’s testimony regarding his limitations not entirely credible, noting:

16 The claimant testified that he may go for a week without socializing with anyone and socializes
17 on occasion. Yet, he testified that he got a job in 2006 by socializing with folks who hung out a
18 tea place (chia [sic] house). The claimant further alleged memory problems when suffering
19 from stress and that he is not always able to use the computer due to his bipolar, but he testified
20 that he attended a community college a year ago taking office training and computer courses.
21 These activities would have involved some level of interaction with others, and college classes
22 would involve some level of concentration on the computer. Indeed, the claimant testified that
he continues to work on his AA (associates in arts) degree by taking a small load and signs up for
things that interest him. He takes a general course instead of a focused course because he is
unable to follow through with anything. Yet, the record shows that while the claimant alleged
that he struggled with his studies, he managed to achieve some A’s in the fall of 2002. College
transcripts show that the claimant had a cumulative grade point average of 3.0, and he is within
three credits from earning his AA degree. The claimant’s level of activity supports an adequate
ability to interact with others and an adequate level of concentration persistence and pace to
complete college courses and achieve grades good enough to earn a significant number of
college credits within the alleged period of disability. Therefore, the claimant’s actual level of
functioning is more than consistent with the current residual functional capacity for unskilled
work.

22 AR 26-27. The fact that plaintiff attended community college is relevant to a determination of his credibility

D. Step Five Analysis

In posing a hypothetical to a vocational expert, the ALJ must accurately reflect all of the claimant's limitations. *Embrey*, 849 F.2d at 422-24. In order for the vocational expert's testimony to constitute substantial evidence, the hypothetical posed must "consider all of the claimant's limitations." *Andrews*, 53 F.3d at 1044. The ALJ is not required to include limitations for which there is no evidence. *Osenbrock v. Apfel*, 240 F.3d 1157, 1164-65 (9th Cir. 2001).

Here, the hypothetical may be incomplete to the extent that it does not reflect the lay witness testimony or the medical opinion of Dr. Morris that were improperly rejected. As a result, the questions posed to the vocational expert and his responses are legally deficient and of no evidentiary value. *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 886 (9th Cir. 2006). On remand, the ALJ should properly evaluate the evidence in accordance with appropriate legal standards and incorporate them into a hypothetical to the vocational expert.

V. CONCLUSION

For the foregoing reasons, the Court recommends that the Commissioner's decision be REVERSED and REMANDED for further proceedings not inconsistent with this Report and Recommendation. In particular, the ALJ should articulate specific findings for rejecting the testimony of the lay witness, reevaluate the medical evidence, give proper weight to the opinions of Dr. Morris, and hear testimony from a VE concerning the full vocational impact of

with regards to allegations that he is unable to perform unskilled work. *See Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)(holding that the ALJ is permitted to draw an adverse inference as to the plaintiff's credibility when the claimant is able to engage in daily activities inconsistent with an alleged impairment). The ALJ did not err by finding that plaintiff's level of activities were inconsistent with the impairments alleged, thereby making an adverse credibility finding.

01 all of Plaintiff's impairments based on, among other things, a reassessment of plaintiff's RFC.
02 This testimony shall include answering a hypothetical that takes into account all of plaintiff's
03 limitations. With this information, the ALJ should then apply all appropriate steps of the
04 sequential evaluation process to determine whether Plaintiff's severe impairments render him
05 disabled for purposes of Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and
06 1381-83f. A proposed order accompanies this Report and Recommendation.

07 DATED this 15th day of July, 2009.

08 s/ Mary Alice Theiler
09 United States Magistrate Judge
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